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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

KORAY ERGUR, Plaintiff and Appellant, v. CALIFORNIA MORTGAGE & REALTY, INC. et al., Defendants and Respondents.	A149359 (San Francisco County Super. Ct. No. CGC16550825)

Plaintiff Koray Ergur appeals an order granting a special motion to strike (Code Civ. Proc.,[1] § 425.16) his complaint filed by defendants TMG Partners and Michael Covarrubias. He contends that his claims against TMG and Covarrubias did not arise from actions that constituted protected activity under the anti-SLAPP statute, and that the trial court erroneously found he could not establish a probability of prevailing on the merits. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Complaint

In March 2016, Ergur filed a complaint against defendants California Mortgage and Realty, Inc. (CMR), David Choo, Henry Park, James Gala, Gary Catron, Cihat Esrefoglu, Lloyd Coleman, Donald Lew, Richard Johnson, Covarrubias, TMG, and

[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

Myxolidian, LLC. The complaint alleged 11 causes of action for: (1) breach of oral partnership agreement; (2) breach of fiduciary duty; (3) unfair business practice; (4) fraud and misrepresentation; (5) breach of the covenant of fair dealing; (6) conspiracy; (7) breach of contract; (8) accounting; (9) violation of the Real Estate Settlement Procedures Act; (10) exemplary and punitive damages; and (11) violation of the Racketeer Influenced and Corrupt Organizations Act.

In summary, the complaint alleged the following. Around 2003, Ergur and his company, Conxo, Inc., entered into an oral partnership agreement with Choo and his company, CMR, to develop real estate projects in San Francisco. One such project was the "First and Mission Project" (the Project) in downtown San Francisco. This partnership was called the Ergur Real Estate Group (EREG). As the partnership grew, defendants Gala, Esregoflu, Catron, Coleman, Lew, Johnson, and Covarrubias became partners. Covarrubias was also the chairman and chief executive officer of defendant TMG.

Ergur alleged that one of the partnership's practices was to get Ergur to refinance his own real estate holdings, then use the capital to invest in CMR's projects. Ergur claimed he was led to believe that, in exchange, he would be an equal partner in defendants' real estate projects and receive shares of the profits generated. Ergur alleged that the partnership used his real estate to generate millions of dollars in loans, and that the partnership's assets were used to buy real estate throughout California, Ohio, and Nevada.

At some point, defendants convinced Ergur to allow them to record overriding deeds of trust on Ergur's real estate holdings in order to borrow money from various lenders. Defendants told Ergur they would use the funds to finance real estate projects and promised to share profits from such projects. Defendants also promised not to allow Ergur's properties go into default or to foreclose on them. After obtaining overriding

deeds of trust, defendants encumbered the properties with millions of dollars in deeds of trust. Eventually, defendants let Ergur's properties go into default.

Despite assuring Ergur they would not foreclose on various properties, between 2008 and 2014, defendants commenced "global foreclosure proceedings" on Ergur's properties in California, Ohio, and Nevada. Defendants then filed a series of bankruptcy proceedings to protect their interests in the partnership assets. These bankruptcy proceedings went on from 2008 to 2015. As a result of the bankruptcy proceedings, defendants acquired most of the pre-petition assets, including an interest in the Project, while using straw buyers to avoid their obligations to prior investors and creditors, such as Ergur. Covarrubias and TMG allegedly realized millions of dollars in profit from the sale of the Project and remain silent partners on future profits funneled through secret shell companies, while Ergur received nothing in return for his investment.

B. Anti-SLAPP Motion

Covarrubias and TMG filed a demurrer to the entire complaint concurrently with a special motion to strike the complaint. In their special motion to strike, they argued Ergur's complaint as to them solely concerned their acquisition of the Project, which was a protected activity per section 425.16, subdivision (e)(4), because the acquisition was overseen and approved in a bankruptcy proceeding and it was an issue of public interest. Covarrubias and TMG also contended that Ergur could not establish a probability of prevailing on the merits.

The motion was accompanied by the declaration of Covarrubias. Covarrubias denied having any business relationship with Ergur and denied having any partnership relationship with named defendants Gala, Esrefoglu, Catron, Coleman, Lew, and Johnson. Covarrubias averred that he and TMG became involved in the Project only after a company called MS Mission Holdings acquired title to it via foreclosure sale in January 2012, and that Choo and companies associated with Choo raised issues regarding the validity of the foreclosure sale in state court and bankruptcy court. It was only after

this that FM Owner—a company Covarrubias and TMG have ties with—contracted to buy the Project contingent on the bankruptcy court's approval. In June 2013, the bankruptcy court approved the transaction, and FM Owner acquired title to the Project. Covarrubias asserts that none of the funds for this transaction came from Ergur or from the non-TMG defendants named in the complaint.

C. Opposition

Ergur opposed the special motion to strike, arguing section 425.16 did not apply because neither Covarrubias nor TMG had been parties to the bankruptcy litigation and because Ergur could show a probability of prevailing. In his opposing declaration, Ergur asserted the complaint did not concern the defendants' right to petition the court. Immediately following that statement, however, is Ergur's assertion that he believes there was a fraud perpetrated upon the bankruptcy court. Ergur then goes on to describe his relationship with Covarrubias culminating in the bankruptcy proceedings.

In sum, Ergur started doing business with Covarrubias and TMG in August 2008, and was in a partnership with TMG and Choo for the sole purpose of acquiring the Project. Around August 2008, at the request of Covarrubias and Choo, Ergur submitted a bid to purchase the Project for $72.5 million dollars. His bid was successful, but the sale of the Project became the subject of a number of lawsuits, and thereafter both Choo and Covarrubias convinced him not to become involved in the litigation. In bankruptcy court, TMG, Choo, and Covarrubias obtained the Project and were "significantly rewarded . . . with millions of dollars" while Ergur got nothing. Ergur alleged Choo and Covarrubias used him as a straw buyer to place the initial bid on the Project so that they would appear to be disinterested parties in the bankruptcy proceedings. Ergur asserted he relied to his detriment on Covarrubias, TMG, and Choo in acquiring the Project, and in the end, was "misled, manipulated and defrauded."

D. Reply

In reply, Covarrubias submitted another declaration stating that Ergur's opposing declaration jogged his memory concerning events involving Ergur and TMG in 2008. Specifically, TMG learned after-the-fact that Ergur had used TMG's name in a proposal he submitted for the Project. Covarrubias denied there was any joint venture with Ergur at any time, and when TMG learned Ergur had used its name, TMG sent an email on August 25, 2008 to the individual Ergur submitted his bid to, disclaiming any involvement with Ergur's proposal. Covarrubias further stated he had TMG review its records for other contacts with Ergur and discovered in 2007 Ergur referenced TMG's name on his website, insinuating a business relationship when none existed, prompting TMG to request that Ergur remove the name. TMG's records revealed no further dealings with Ergur.

E. Trial Court's Ruling

On May 20, 2016, the trial court granted the special motion to strike in its entirety and took the demurrer off calendar as moot. The trial court determined Ergur's claims against Covarrubias and TMG were based in substantial part on their participation in the bankruptcy proceedings by obtaining a court order authorizing the purchase of real property. As such, the claims arose out of protected activity pursuant to section 425.16, subdivision (e)(4). Moreover, Ergur failed to show a probability of prevailing because: (1) his claims were time barred insofar as the fraud claims were based on events that occurred in 2008 and were then known to Ergur, and (2) Ergur failed to set forth any evidence of wrongdoing by Covarrubias and TMG.

F. Motion for Reconsideration

Ergur filed a motion for reconsideration (§ 1008) of the order granting the special motion to strike. The trial court denied the motion on July 27, 2016, stating Ergur failed to show any of his claims against Covarrubias and TMG were filed within the applicable limitations period. Ergur appealed.

DISCUSSION

A. Governing Law and Standard of Review

The anti-SLAPP statute provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

Resolution of an anti-SLAPP motion involves two steps. "Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least 'minimal merit.' " (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*).) "[T]he trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) We conduct a de novo review of the trial court's decision to grant an anti-SLAPP motion. (*Park*, at p. 1067.)

B. Analysis

1. Protected Activity

We begin with the first inquiry in the section 425.16 analysis: whether Covarrubias and TMG made the threshold showing that the challenged claims arose from protected activity. "A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park, supra*, 2 Cal.5th at p. 1062.) "[T]he critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) The burden at this stage "is not an onerous one. A defendant need only

make a prima facie showing that the plaintiff's claims arise from the defendant's constitutionally protected free speech or petition rights." (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 112.) Here, the trial court found that Ergur's claims against Covarrubias and TMG arose, in substantial part, out of protected activity within the meaning of section 425.16, subdivision (e)(4). We agree.

"A cause of action arises from protected activity within the meaning of section 425.16, subdivision (e)(4) if (1) defendants' acts underlying the cause of action, and on which the cause of action is based, (2) were acts in furtherance of defendants' right of petition or free speech (3) in connection with a public issue." (*Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 142–143.)

Although Ergur's complaint is somewhat unclear as to the basis of his claims against Covarrubias and TMG, Ergur's opposing declaration clarifies he is seeking relief based on their acquisition of the Project through the bankruptcy court. More specifically, Ergur's declaration represents he began doing business with Covarrubias and TMG in August 2008, and his complaint alleges bankruptcy proceedings were ongoing from 2008 to 2015. Ergur further states he was in a partnership with TMG and Choo in August 2008 for the *sole* purpose of acquiring the Project. At the request of Covarrubias and Choo, Ergur submitted a bid to purchase the Project for $72.5 million dollars, which he could not personally fund. Ergur believed he would help develop the Project with Covarrubias, TMG, and Choo. After winning the bid, however, the sale of the Project became mired in litigation, and both Choo and Covarrubias convinced him not to get involved. Covarrubias, TMG, and Choo eventually obtained the Project in bankruptcy court and were allegedly rewarded "with millions of dollars" while Ergur received no share of their profit. Ergur stated Choo and Covarrubias used him as a straw buyer to place the initial bid on the Project so they would appear to be disinterested parties in the bankruptcy proceedings. Ergur also stated the bankruptcy court's trustee employed financial advisors

with ties to Choo and CMR to get approval of FM Owner's acquisition of the Project, suggesting misconduct.

Because it appears the gravamen of Ergur's claims against Covarrubias and TMG is their acquisition of the Project through the bankruptcy court, Ergur is incorrect in suggesting that the bankruptcy proceedings were merely incidental to his claims against the two. On the contrary, Ergur's own declaration reflects that the bankruptcy proceedings are a substantial and significant part of the factual allegations underlying his claims. (See *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675 [finding first step of anti-SLAPP analysis satisfied where plaintiffs' claims were "based in significant part" on protected petitioning activity]; *A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1125.) Indeed, it appears that but for the acquisition of the Project by Covarrubias and TMG through the bankruptcy court, Ergur's claims against them would have no basis. (*Navellier*, *supra*, 29 Cal.4th at p. 90.)

Ergur does not dispute that petitioning a bankruptcy court to approve acquisition of a property is an act in furtherance of the right to petition protected under section 425.16. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 [" 'A cause of action "arising from" defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike.' [Citation.] 'Any act' includes communicative conduct such as the filing, funding, and prosecution of a civil action"].) Instead, Ergur contends that neither Covarrubias nor TMG was involved in any protected activity because they were not interested parties in the bankruptcy proceeding, as they had no actual ownership interest in an LLC involved in the bankruptcy proceeding; and his complaint did not mention any bankruptcy proceedings.

These contentions are unavailing for several reasons. First of all, Ergur has forfeited these arguments because they are unaccompanied by citations to the record. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 (*Kim*).) Even if not forfeited,

Ergur's assertions are contradictory and belied by the record. Contrary to his assertion that his complaint did not mention bankruptcy proceedings, the complaint explicitly mentions the bankruptcy proceedings as does his opposing declaration. And contrary to Ergur's present claim that Covarrubias and TMG were not interested parties in the bankruptcy proceedings, Covarrubias's declaration provides uncontradicted factual assertions that he and TMG were connected to FM Owner (the company that acquired the Project during the bankruptcy proceedings); that TMG indirectly participated in the acquisition of the Project; and that TMG also had an interest in the Project via a "development management agreement" with FM Owner and FM Owner's successor to assist with the Project. Even Ergur's opposing declaration states: "Although the moving party herein was not personally involved in the bankruptcy cases, they used a complex system of layered LLC[]s to acquire the [Project] through the aforementioned use of alleged disinterested parties and an unknowing Trustee."

The next question is whether the use of bankruptcy proceedings to obtain the property was an issue of public interest. " 'The definition of "public interest" within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity.' " (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1233 (*Tuchscher*).) Case law identifies "three nonexclusive and sometimes overlapping categories of statements within the ambit of subdivision (e)(4). [Citation.] The first is when the statement or conduct concerns 'a person or entity in the public eye'; the second, when it involves 'conduct that could directly affect a large number of people beyond the direct participants'; and the third, when it involves 'a topic of widespread, public interest.' " (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 621.)

Here, Covarrubias's declaration, submitted in support of the motion, establishes that the Project's status and acquisition were a subject of media reports and that the Project stood to directly affect a large number of people. Covarrubias averred the Project area included numerous pieces of real property that essentially encompassed "a City block in downtown San Francisco near the Transbay Terminal"; the Project was high profile in San Francisco, and the legal controversy surrounding it, including its acquisition by FM Owner, was regularly reported on in various print and electronic media sources; the Project itself was under careful governmental oversight and scrutiny by the City and County of San Francisco, and was subject to additional oversight because the Project is located in the "Transit Center District Plan" area; and the Project "contemplated entitlement for more than 2 million square feet of office and mixed use space with two high-rise buildings." (See, e.g., *Tuchscher, supra*, 106 Cal.App.4th at pp. 1233–1234.) This is evidence that the Project's acquisition was a matter of public interest.

Ergur provided no evidence or citation to legal authority to contradict the showing made by Covarrubias and TMG on the public interest point. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785.)

We conclude that Covarrubias and TMG made the threshold showing that all of plaintiffs' claims arise from protected activity.

2. Probability of Prevailing

We now turn to assess the sufficiency of Ergur's showing that he has a probability of prevailing on the merits of his complaint. To establish the requisite probability of prevailing, the plaintiff need only " ' "demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' " (*Navellier, supra,* 29 Cal.4th at pp. 88–89.) At this stage of the analysis, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or

defense is based." (§ 425.16, subd. (b)(2).) In considering this second prong, "[w]e do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law. [Citation.] Only a cause of action that lacks 'even minimal merit' constitutes a SLAPP." (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699–700.)

In this case, the trial court determined Ergur failed to show a probability of prevailing because (1) he failed to provide evidence showing his claims had even minimal merit and (2) his claims were time barred. On appeal, Ergur does not challenge the trial court's ruling that he failed to provide *evidence* showing his claims had minimal merit. Similarly, Ergur offers no legal analysis with citations to the record or authority to support his contention that the applicable limitations period was tolled due to ongoing fraud. Without reasoned argument and citations to the record and authority, the claim of error on these points is forfeited. (*Badie, supra*, 67 Cal. App. 4th at pp. 784–785*; Kim, supra,* 17 Cal.App.4th at p. 979; *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 283–284 [a conclusory discussion lacking citation to authority amounted to abandonment of an appellate issue concerning a special motion to strike].) In light of the foregoing, we decline to address Ergur's contention on this point.

DISPOSITION

The judgment is affirmed.

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Fujisaki, Acting P.J.

WE CONCUR:

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Petrou, J.

_____
Wiseman, J.[*]

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[*] Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.